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91-237

NO.

Supreme Court, U.S.
FILED

AUG 6 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

IN RE: CONDEMNATION BY COMMONWEALTH
OF PENNSYLVANIA, PUBLIC UTILITY
COMMISSION OF RIGHT-OF-WAY FOR
LEGISLATIVE ROUTE 1058, SECTION A04,
A LIMITED ACCESS HIGHWAY IN SOUTH
UNION TOWNSHIP,

ANDREW BARRON and HELEN BARRON and
FRANK HORVATH and ANNA HORVATH,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

SIMON B. JOHN, ESQUIRE
Counsel for Petitioner
96 East Main Street
Uniontown, PA 15401
412-438-8560



QUESTIONS PRESENTED

1. Whether Section 2704(b) of the Pennsylvania Public Utilities Code is unconstitutional because it usurps the judicial powers of the Courts of Common Pleas of the Commonwealth of Pennsylvania?

2. Whether the decision of the Supreme Court of Pennsylvania reversing the Commonwealth Court and dismissing Appellants' Petition for Appointment of Board of View is violative of due process of law and is an unconstitutional taking of Appellant's property?



TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Table of Authorities	1
Opinions Below	2
Statement of Grounds on Which Jurisdiction Is Invoked	3
Statutes Involved	4
Statement of the Case	5
Reasons for Granting Certiorari	12
I. Section 2704(b) of the Pennsylvania Public Utilities Code unconstitutionally usurps the judicial powers of the Courts of Common Pleas of the Commonwealth of Pennsylvania . .	13
II. The decision of the Supreme Court of Pennsylvania reversing the Commonwealth Court, and dismiss- ing Petitioners' Petition for Appointment of Board of View is violative of due process of law and is an unconstitutional taking of property without just compensation	19
Conclusion	25
Appendix "A" - Order of the Supreme Court of Pennsylvania dated May 9, 1991	A-1
Appendix "B" - Order of the Supreme Court of Pennsylvania dated March 21, 1991	B-1



Appendix "C" - Opinion of the Commonwealth Court of Pennsylvania dated March 27, 1989	C-1
Appendix "D" - Order of the Commonwealth Court of Pennsylvania dated March 27, 1989	D-1
Appendix "E" - Commonwealth Court of Pennsylvania Dissenting Opinion of Judge Smith dated March 27, 1989 . .	E-1
Appendix "F" - Order of Commonwealth Court of Pennsylvania dated June 2, 1989.	F-1
Appendix "G" - Relevant provisions of United States and Pennsylvania Constitutions, Pennsylvania Eminent Domain Code, Pennsylvania Judicial Code and Pennsylvania Public Utilities Law.	G-1

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TABLE OF AUTHORITIES

	Page (s)
<u>Barron v. Pa. Department of Transportation, ___ Pa. Cmwlth. ___, 557 A.2d 1109 (1988)</u>	17
<u>Chevron USA v. National Resources Defense Council, Inc., et al., 467 U.S. 837 (1984)</u>	15
<u>Huss v. Commonwealth of Pennsylvania, Department of Transportation, 99 Pa. Cmwlth. 386, 512 A.2d 1356 (1986)</u>	2,11
<u>CONSTITUTIONS AND RELAVANT STATUTORY PROVISIONS:</u>	
United States Constitution,	
Article V.	18,21,24
Article XIV.	19
Pennsylvania Constitution,	
Article I, Section 1	5
Article I, Section 10.	18,21
Article I, Section 11.	14
Pennsylvania Eminent-Domain Code,	
26 P.S. Section 1-502(a)	5,15,17
Pennsylvania Judiciary Code,	
42 Pa. C.S.A. Section 931(a)	5
Pennsylvania Public Utility Code,	
66 Pa. C.S.A. Section 2704(b).	4,13-14,17



OPINIONS BELOW

The following Opinions have been rendered by Courts below:

A. The Supreme Court of Pennsylvania, Western District, Per Curiam Order dated May 9, 1991, which is not yet reported:

"Per Curiam:

AND NOW, this 9th day of May, 1991, appellees' Application for Reargument is denied."

B. Supreme Court of Pennsylvania, Western District, Per Curiam Order dated March 21, 1991, reported at ___ Pa. ___, 587 A.2d 727 (1991):

"Per Curiam:

Order of Commonwealth Court reversed. See Huss v. Commonwealth of Pennsylvania, Department of Transportation, 99 Pa. Commw. 386, 512 A.2d 1356 (1986)."

C. The Commonwealth Court of Pennsylvania Order dated March 27, 1989, which is reported at ___ Pa. Cmwlt. ___, 557 A.2d 1109 (1989):

"AND NOW, March 27, 1989, the Order of the Court of Common Pleas of Fayette County, dated March 23, 1987, is reversed."



D. Order of the Court of Common Pleas of Fayette County, Pennsylvania, dated March 23, 1987, which is not set forth in an official reporter:

"AND NOW, March 23, 1987, the within Motion to Dismiss is granted, and the subject Petition for the appointment of a Board of View is hereby dismissed."

STATEMENT OF GROUNDS ON WHICH
JURISDICTION IS INVOKED

Petitioner seeks review of the Order of the Supreme Court of Pennsylvania, Western District, dated May 9, 1991. In that Order, the Pennsylvania Supreme Court denied Barron and Horvath Petition for Reargument of the Order dated March 21, 1991, which Order reversed the decision of the Commonwealth Court of Pennsylvania, dated March 27, 1989.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257(a) and Supreme Court Rule 10, and because



Petitioner is seeking review of the constitutionality of a Pennsylvania statute, namely Section 2704(b) of the Public Utility Code and the interpretation and application of that provision by the Pennsylvania Court of the last resort, namely the Pennsylvania Supreme Court.

STATUTES INVOLVED

Petitioner is challenging the constitutionality of those provisions of the Pennsylvania Public Utility Code pertaining to the jurisdiction of the Public Utility Commission over matters involving condemnation of property by the Pennsylvania Department of Transportation. The constitutions, statutes and regulations involved are as follows:

1. Article XIV, Section 1,
United States Constitution;
2. Article V, United States
Constitution;



3. Article I, Section 1 and Section 11 of the Pennsylvania Constitution;
4. Article I, Section 10 of the Pennsylvania Constitution;
5. The Pennsylvania Public Utilities Code, active 1978, July 1, P.L. 598, No. 116, as codified at 66 Pa. C.S.A. Section 2704;
6. The Pennsylvania Eminent Domain Code, as amended, and codified at 26 P.S. Section 1-502;
7. The Pennsylvania Judicial Code, as codified at 42 Pa. C.S.A. Section 931.

The relevant portions of the above-referenced authorities are set forth at Appendix "G".

STATEMENT OF THE CASE

Your Petitioners, Andrew and Helen Barron and Frank and Anna Horvath, are the owners of real estate located in Fayette County, Pennsylvania. Petitioners are asking this Honorable Court to issue a Writ of Certiorari to the Pennsylvania Supreme Court, to review



the constitutionality of those provisions of the Pennsylvania Public Utilities Code which empower an administrative agency, the Public Utilities Commission, (hereinafter referred to as "Commission") to perform certain adjudicatory functions in eminent domain cases.

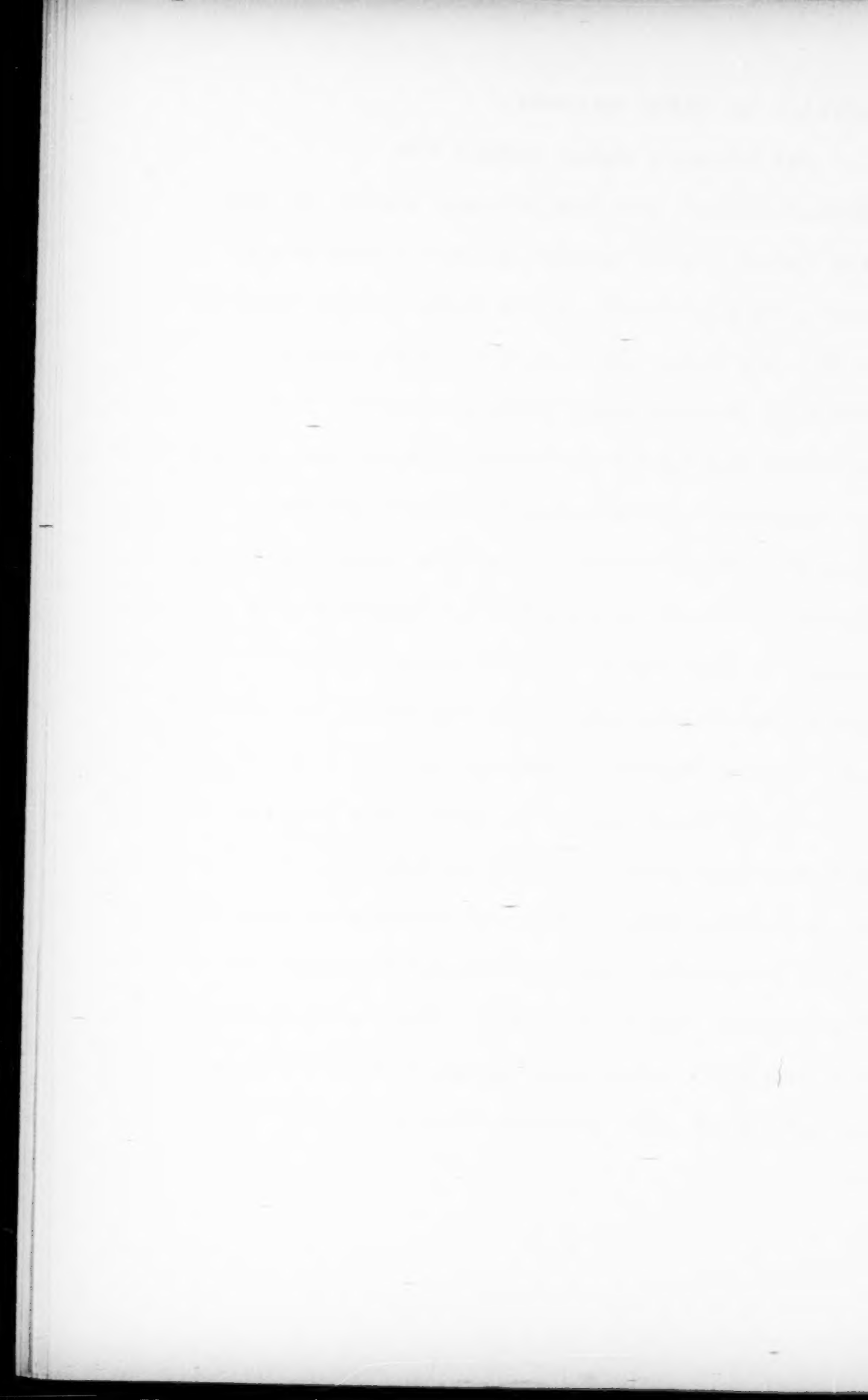
Petitioners have raised the constitutionality of the relevant provisions throughout those proceedings. The constitutional issues first became ripe for review when the Department of Transportation filed the Motion to Dismiss in 1987. At that time, Petitioners challenged the constitutionality of the relevant portions of Public Utility Code in Argument III of their Brief in Response to Motion to Dismiss filed in the Court of Common Pleas of Fayette County, Pennsylvania, at No. 977 and 978 of 1979 G.D. on March 6, 1987. That Court failed to address the issues and rendered its



decision on other grounds.

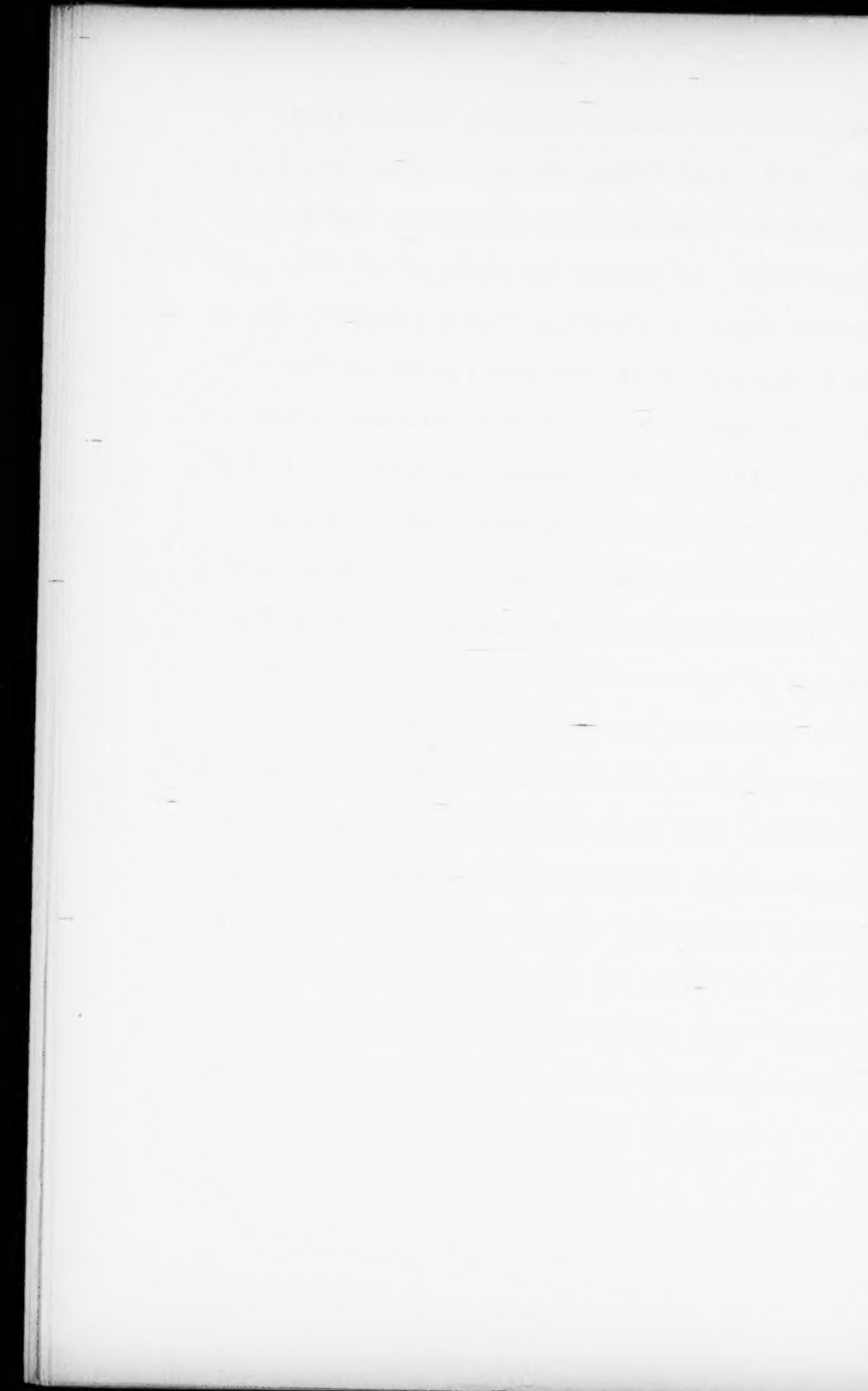
Petitioners again raised the constitutional and due process issues at the next level, their appeal to the Commonwealth Court, as set forth in the Brief filed therein at No. 810 C.D. 1987, p. 15. That Court found in Petitioners' favor, however, its decision was based on other grounds and it did not dispose of the constitutional issues. Finally, Petitioners raised the constitutional issues in their opposition to Respondent's appeal to the court of last resort, the Pennsylvania Supreme Court (Brief at No. 4 W.D. Appeal Docket, 1990, p. 10).

On or about April 8, 1974, the Barrons and Horvaths were informed by the Pennsylvania Public Utility Commission that their properties were condemned by Order A-97492 dated March 26, 1974. The Petitioners, "Condemnees", were paid certain sums of money as estimated just compensation by the



Department of Transportation (hereinafter referred to as "Department"). Thereafter, the Condemnees timely filed petitions seeking appointment of Boards of View in the Court of Common Pleas of Fayette County, Pennsylvania, in accordance with the provisions of the Eminent Domain Code, 26 P.S. Section 1-502. Those petitions contained the Public Utility Commission docketing number, and both the Public Utility Commission and the Department of Transportation were duly notified of the filing of same. No preliminary objection or other response was made by either the Department or the Commission at that time. In addition, the Applications for Estimated Just Compensation completed by the Petitioners set forth a reference to the filing in the Court of Common Pleas of Fayette County, Pennsylvania and the docket number of the matters in that court.

A Board of Viewers was initially



appointed by the Court of Common Pleas on July 12, 1979. No preliminary objections were filed at that time, and the record is devoid of any motions for continuance or other requests by Respondent's counsel. Various correspondence between the parties reflects that the property was not physically taken by the Department of Transportation and therefore, the Board of View did not need to be convened. Condemnees were finally notified by the Department in May 1985 that the highway project was to be resumed and a hearing therefore became necessary to determine the value of the condemned property. Since the Board of View had previously been appointed, Petitioners requested a hearing to determine the property value. The Department objected to that request alleging that jurisdiction was in the Public Utilities Commission.

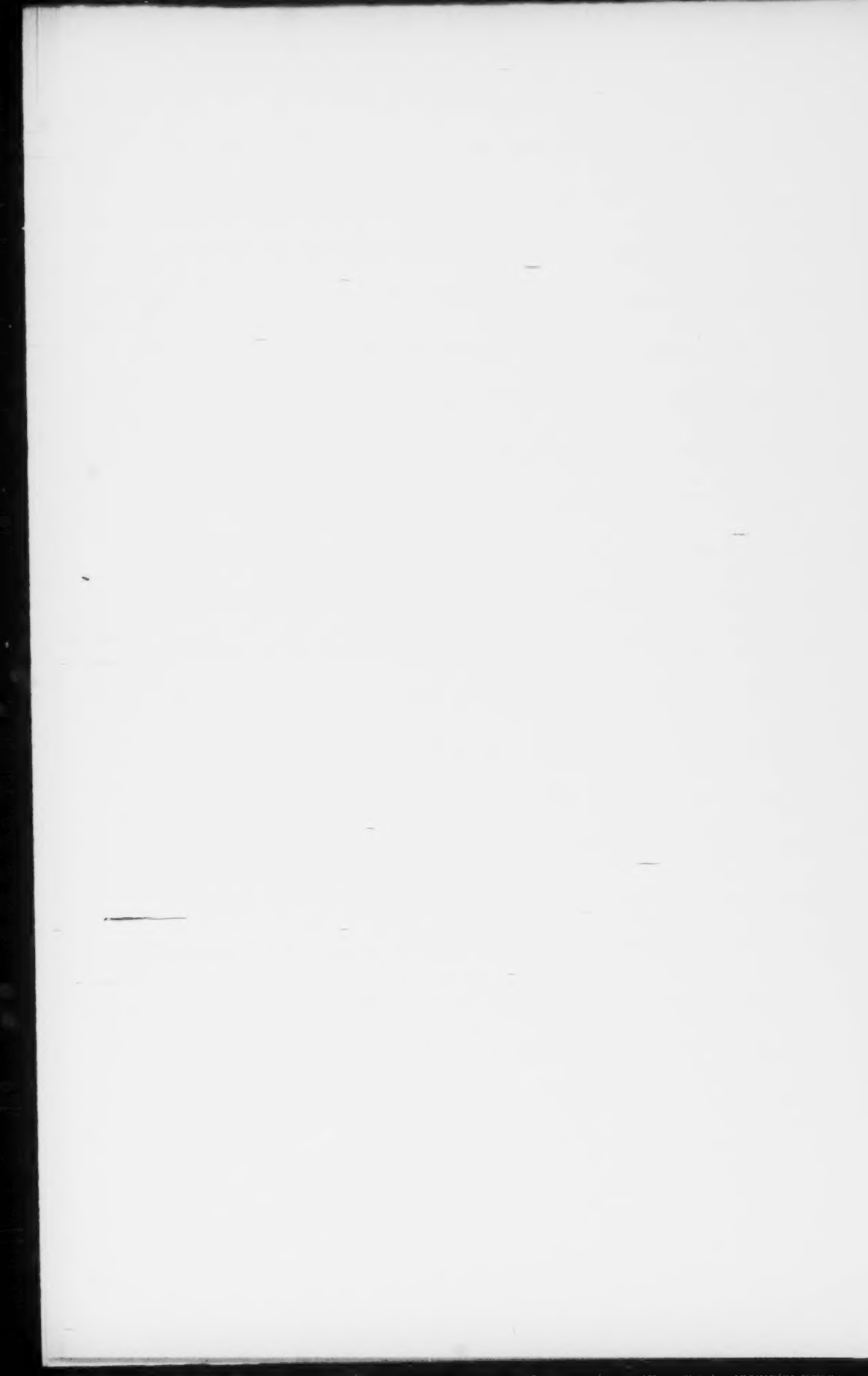
On July 8, 1986, Petitioners filed with the Public Utility Commission a Petition to



Transfer Jurisdiction Nunc Pro Tunc to Fayette County Court of Common Pleas. On August 26, 1986, the Public Utility Commission granted that Petition.

The Department of Transportation did not appeal the Commission's determination of August 26, 1986, nor did it file any preliminary objection thereto, but waited until February 6, 1987 to file a Motion to Dismiss for lack of jurisdiction with the Common Pleas Court. In an Opinion and Order dated March 23, 1987, the Honorable Conrad B. Capuzzi of that Court granted the Commonwealth Motion to Dismiss and accordingly dismissed the Petition for Appointment of Board of View. The matter has been on appeal since that time, and no court has ever reached the merits of Petitioners' claims for compensation, nor has the Board of Viewers convened to ascertain the property value.

Petitioners filed a timely appeal to the



Commonwealth Court of Pennsylvania. The Commonwealth Court is a mid-level appellate court with exclusive jurisdiction over Commonwealth agency matters. 42 Pa. C.S.A. Section 561 et seq. Following the filing of briefs and arguments, the Commonwealth Court reversed the decision of the Court of Common Pleas. The Department of Transportation filed an Application for Reargument with the Commonwealth Court, which Application was denied.

The Department of Transportation thereafter sought and was granted allowance of appeal by the Supreme Court of Pennsylvania. On March 21, 1991, the Supreme Court reversed the Order of the Commonwealth Court, relying upon Huss v. Commonwealth of Pennsylvania, Department of Transportation, 99 Pa. Cmwlth. 386, 512 A.2d 1356 (1986), appeal dismissed 518 Pa. 466, 544 A.2d 446. Petitioners thereafter filed a timely Petition for



Reargument, which Petition was denied on May 9, 1991.

Petitioners now seek the grant of a Writ of Certiorari to review the constitutional issues concerning access to courts in eminent domain proceedings.

REASONS FOR GRANTING CERTIORARI

Petitioners, Andrew and Helen Barron and Frank and Anna Horvath, respectfully request that the within Writ be granted, as the instant case poses an important question concerning the constitutionality of the hearing provisions of the Pennsylvania Public Utilities Code, as ruled upon by that State's Court of last resort, the Supreme Court of Pennsylvania. These issues are of importance to administrative agency jurisdiction in federal as well as Pennsylvania matters, because the scope of an agency's power, to

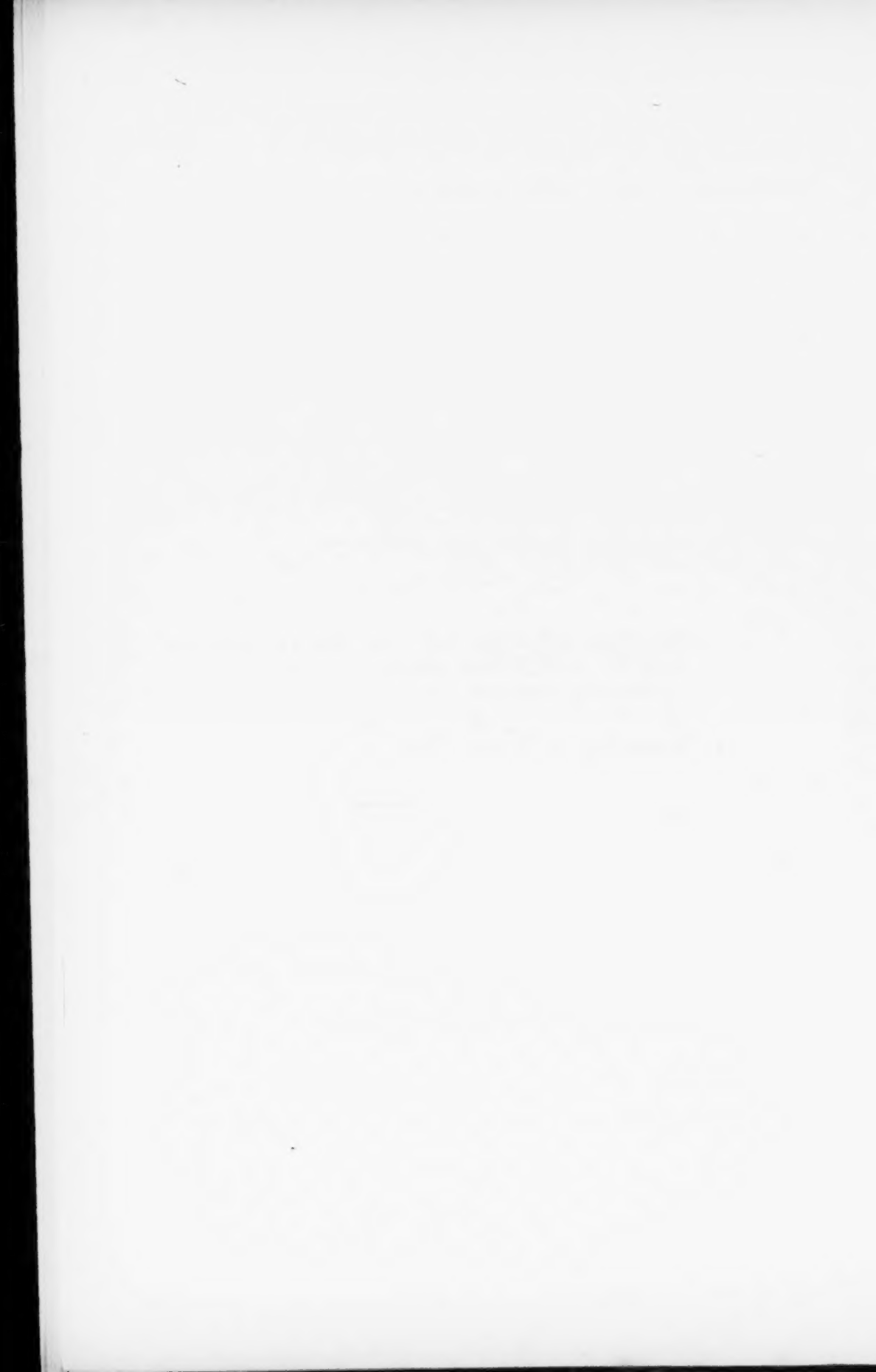


promulgate regulations and thereafter interpret those same regulations, is of national significance. The parameters of administrative agency authority must be defined and clarified by this court. The instant case, where a state administrative agency has been deemed by Pennsylvania courts to possess overreaching adjudicatory powers, presents such an issue for review.

I. Section 2704(b) of the Pennsylvania Public Utilities Code unconstitutionally Usurps the judicial powers of the Courts of Common Pleas of the Commonwealth of Pennsylvania.

The provisions of the Pennsylvania Public Utilities Code pertaining to judicial review are unconstitutional because they usurp the powers of the Courts of Common Pleas and because they deprive property owners of notice and hearing.

The pertinent provisions of the Public Utilities Code, Act of 1978, July 1, P.L. 598,



No. 116, as codified at 66 Pa. C.S.A. Section 2704, and relating to compensation for damages occasioned by the construction, relocation or abolition of crossings are as follows:

"(b) Judicial Review - Any party to the proceeding dissatisfied with the determination of the Commission may appeal therefrom, as provided by law, . . . The Commission may, of its own motion, or upon application of any party in interest, submit to the Court of Common Pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation. . . ."

66 Pa. C.S.A. Section 2704.

The above provision is unconstitutionally vague and deprives property owners of due process as it fails to provide a procedure for property owners to apply directly to the Court of Common Pleas wherein the subject property is located. This imperfection violates Article I, Section 11 of the Pennsylvania Constitution as failing to allow open access to the Courts for property owners affected by

Eminent Domain proceedings. Moreover, this imperfection in the Code usurps the power of the Courts of Common Pleas as granted to them by the Eminent Domain Code at 26 P.S. Section 1-502 and 42 Pa. C.S.A. Section 931.

A plaintiff's right of action in a Court of Common Pleas, particularly where the Court is vested with power to determine appropriate compensation, should not be precluded by his failure to seek action at the administrative level; it is far more practical and judicially sound for the matter to be heard in the Court of Common Pleas in the first instance.

In Chevron USA v. National Resources Defense Council, Inc., et al., 467 U.S. 837 (1984), this Honorable Court established administrative agencies' power to formulate policies in order to implement statutorily-created programs. However, this case involves situations where one commonwealth agency, the Department of Transportation, seeks to extend

Figure 1.1

the powers of another commonwealth agency, the Public Utilities Commission, beyond formulating policy, to interpreting its regulations. In other words, an administrative agency (PUC) would perform the functions of two (2) branches of government: the executive by formulating policy (in promulgating regulations), and the judicial by interpreting those policies. This matter must be reviewed to determine whether such a use of power is repugnant to the Constitution, and gives rise to excessive agency invasion of the judicial branch.

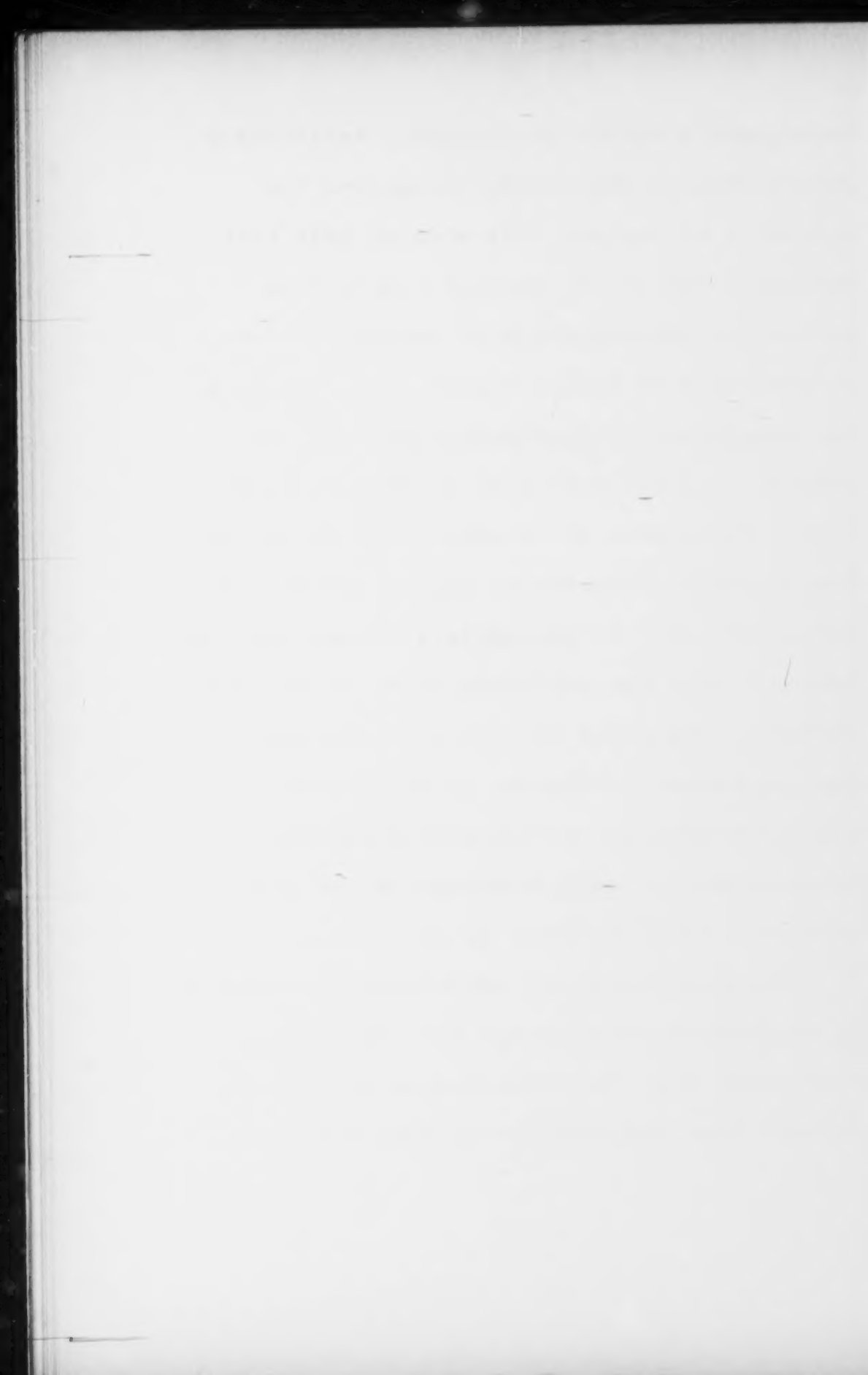
The Pennsylvania Commonwealth Court is the appellate court vested with exclusive jurisdiction over governmental agency appeals.¹ That Court found in favor of your Petitioners and reversed the grant of the

¹ The Commonwealth Court was created by the 1968 Pennsylvania Constitutional Amendments, Article 5, Section 4; the Court came into existence in 1970.



Department's Motion to Dismiss. Petitioners submit that it implicitly recognized the infirmity of Section 2704 when it held that Section 1-303 of the Eminent Domain Code allows the determination of damages to remain in the Court of Common Pleas. See, Barron v. Pa. Department of Transportation, ____ Pa. Cmwlth. ___, 557 A.2d 1109 (1988), n. 2, at 1110. Therefore, it is clear that while the Public Utility Commission may be vested with exclusive power to appropriate properties, it does not have the exclusive power to determine damages. The grant of such power extends Chevron beyond the intent of this Court, to allow the agencies to not only formulate policies but to apply substantive law and interpret those policies as well.

The exclusivity of jurisdiction possessed by the Pennsylvania Courts was implicitly recognized when the Pennsylvania Legislature enacted laws adopting the Unified Judicial



System at the 1968 Constitutional Convention. The Public Utility Commission was not included in the system as a "Court"; rather, it is merely an administrative agency. Section 1 of the Judiciary Article of 1968 provides as follows:

"The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, the Courts of Common Pleas. . . such other courts as may be provided by law. . ."

Constitution Article V, Section 1.

Neither the Constitution, nor the Legislature recognized the Public Utilities Commission as part of the Unified Judicial System.

Therefore, that agency is not the proper forum for determining just compensation when private property is taken for public use. Rather, the right to just compensation established by United States Constitution, Article V and Pennsylvania Constitution, Article I, Section 10, is adequately protected only where the



condemnees are entitled to an initial hearing before a constitutionally-mandated judicial forum, the Court of Common Pleas.

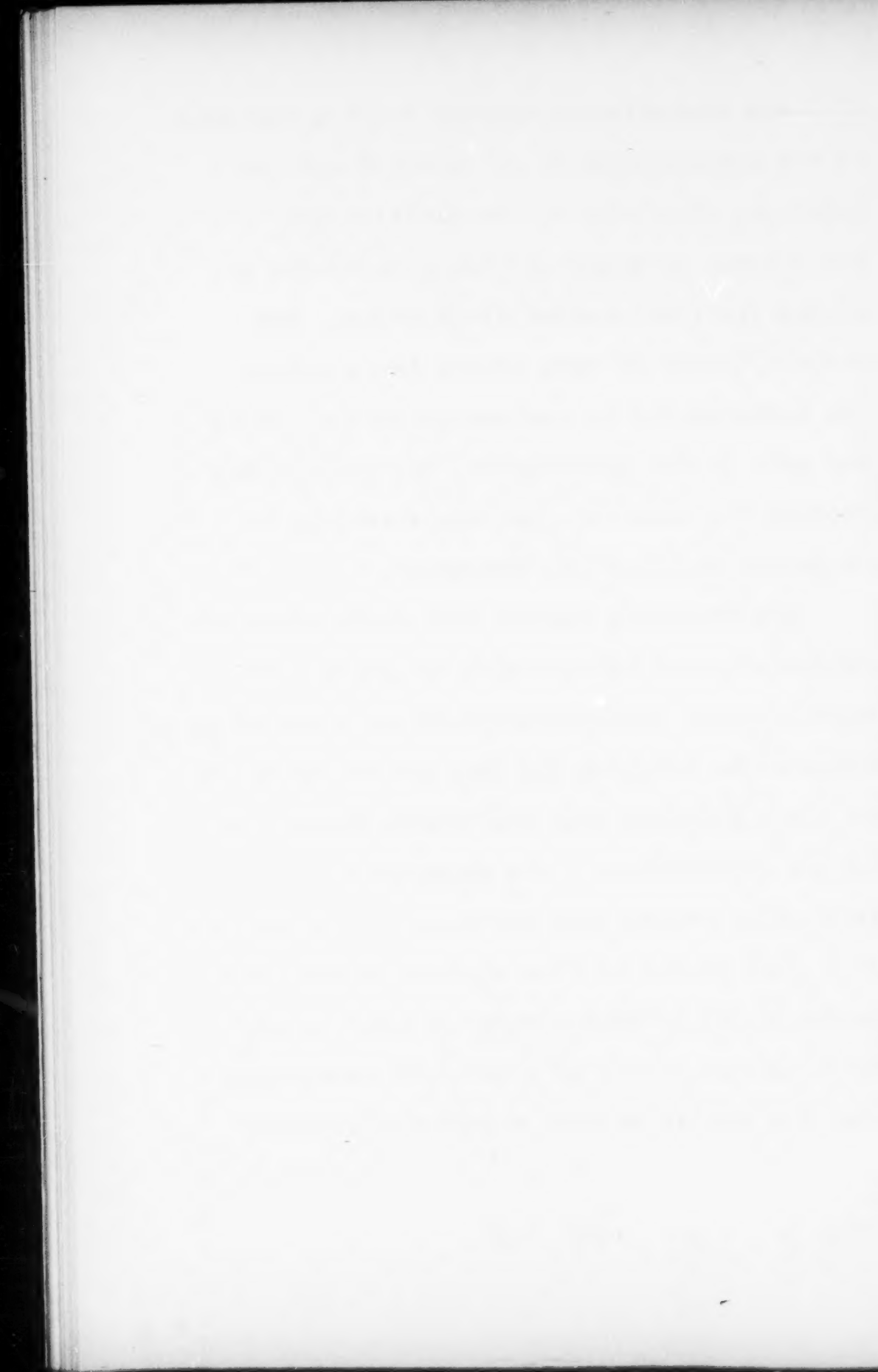
The United States Constitution mandates that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Constitution, Article XIV, Section 1. This mandate requires that the procedural safeguards of notice and opportunity for hearing be given to citizens before they can be deprived of property. These safeguards are particularly necessary in condemnation proceedings where the action of the state is adjudicatory in nature and involves substantive property rights. The matter before this Court is such a case, and accordingly must be reviewed.

II. The decision of the Supreme Court of Pennsylvania reversing the Commonwealth Court, and dismissing Petitioners' Petition for Appointment of Board of View is violative of due process of law and is an unconstitutional taking of property without just compensation.



The Pennsylvania Supreme Court's reversal of the Commonwealth Court decision and the resulting dismissal of the Petition for Appointment of Board of View constitutes an unconstitutional taking of property. The overall effect of this action is to permit the Commonwealth to condemn private property and take it for governmental use without due process for ensuring just compensation, in violation of the Fifth Amendment.

Approximately twelve (12) years after the condemnation of Petitioner's property, the Department of Transportation filed a Motion to Dismiss the Petition for Appointment of Board of View, alleging that the Common Pleas Court lacked jurisdiction. The Department repeatedly relied upon the fact that a twelve (12) year period of time elapsed between the condemnation of Petitioners' properties and Petitioners' filing of a petition requesting that the Public Utility Commission transfer



jurisdiction to the Court of Common Pleas. However, the twelve (12) year period occurred as a result of the Department's failure to complete the highway construction. The lengthy lapse of time is particularly significant because an eminent domain proceeding is unique and distinct from other types of court action in that it involves the power of the state to take property from a private property owner. The Fifth Amendment to the U.S. Constitution and Article I, Section 10 of the Pennsylvania Constitution recognizes this distinction by requiring just compensation in such cases. In light of the fact that the State is taking property and the constitutional issues inherent therein, the courts must consider the safeguards that have been put into place by the Constitution, as well as the unique time elements that will be involved in such a case.

In this case, the Public Utility

Commission condemned the property for use as part of a highway construction project. At the time of condemnation in 1974, the Barrons and Horvaths were paid estimated just compensation and the expectation was that the property would be used promptly for the construction of highways. That highway construction was not commenced until the Fall of 1990. Moreover, it was not until 1986 that the Department notified the property owners that in all likelihood said construction would never be completed; thereafter, the project was reopened and construction began in the Fall of 1990. Therefore, the compensation issues were not ripe for review until that point in time, because the property owners simply did not know what their damages would be until such time as the highway would be complete.

The Department acquiesced in the initial request for appointment of viewers and the



subsequent appointment of the panel, and it encouraged the appointment by virtue of its actions in handling the subject claims. For example, the Applications for Estimated Just Compensation, copies of which have been lodged with the Court, are set forth on forms prepared and provided by the Department of Transportation. Those pre-printed forms contain language to the effect that the matter was "in the Court of Common Pleas of Fayette County, Pennsylvania", and set forth the Common Pleas Court action number.

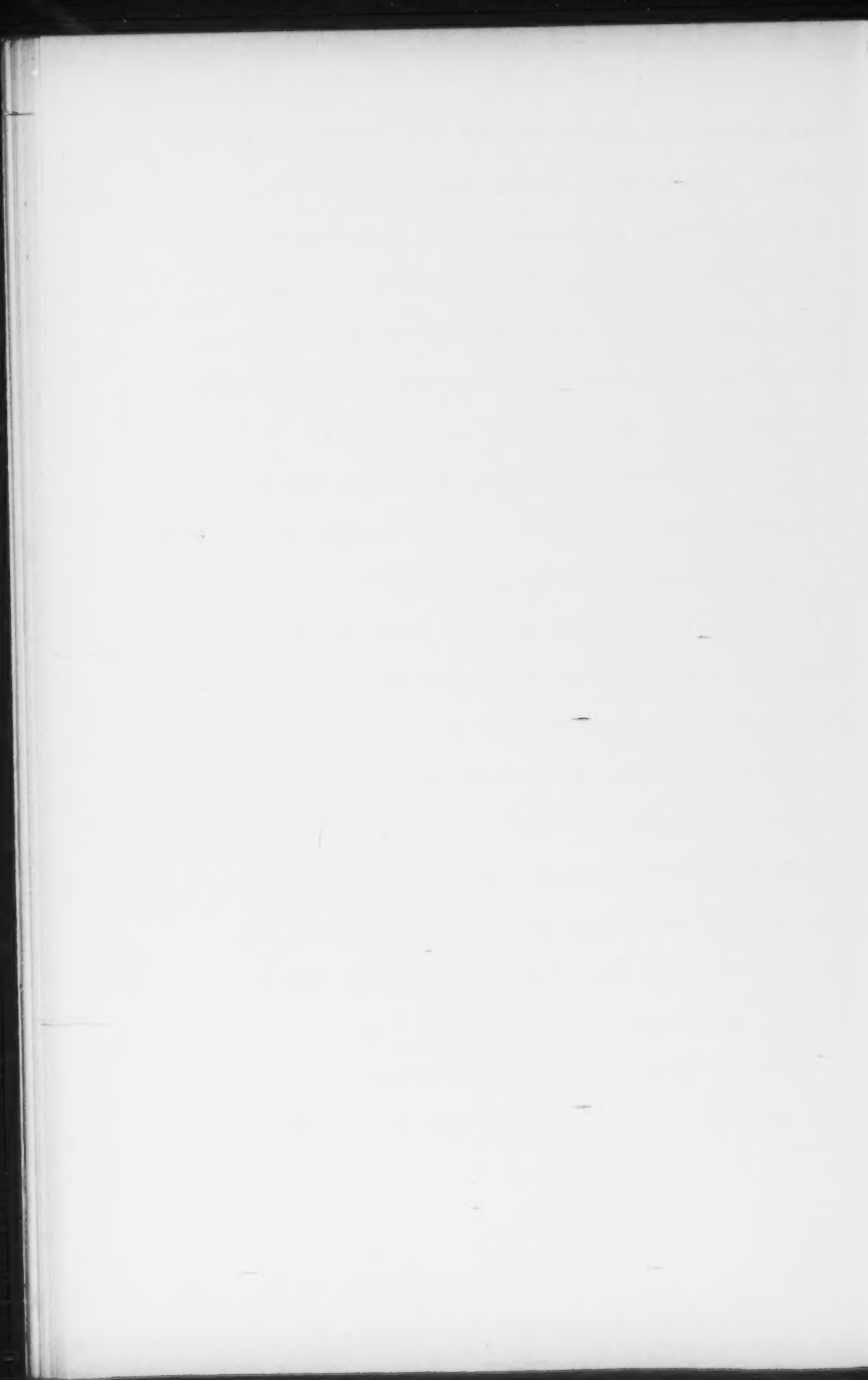
Moreover, by letter dated September 27, 1985, John Claypool of the Department of Transportation notified counsel for Condemnees that settlement negotiations were continuing and that the Commonwealth remained "willing and anxious to discuss the claim." In light of the Department's continued actions throughout the matter it was inappropriate and improper for them to seek a dismissal of



Petitioners' claim before the lower Court in 1986. The Common Pleas Court erred in granting that dismissal, the Commonwealth Court properly recognized that error and reversed it, and the Pennsylvania Supreme Court erred again in reversing that decision and refusing to review that reversal.

It is clear that the property owners pursued their remedies in the proper forum and a timely fashion. The Department of Transportation's actions in sitting back, negotiating a claim and later moving to have the matter dismissed when a resolution was not reached to their satisfaction, constituted an unconstitutional taking of the Petitioners' property and violated the Fifth Amendment. The action violates public policy, and infringes upon the due process and other rights of the property owners.

The Commonwealth Court properly reviewed the entire record and reached a determination



which is in accordance with public policy and the interest of justice. The Pennsylvania Supreme Court's reversal of that Order and refusal to accept reargument is in error. Therefore, the Supreme Court decisions reversing the Commonwealth Court and denying the Application for Reargument must be reviewed to resolve the important constitutional issues raised therein.

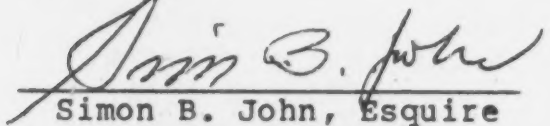
CONCLUSION

Your Petitioners, Andrew and Helen Barron and Frank and Anna Horvath, respectfully submit that, in light of the cases and arguments hereinabove set forth, the within Writ of Certiorari presents important questions concerning access to the courts in eminent domain proceedings and request that this Honorable Court review the instant matter.



Respectfully submitted,

JOHN & JOHN

A handwritten signature in cursive script, appearing to read "Simon B. John", is written over a horizontal line.

Simon B. John, Esquire
Attorneys for Appellees
96 East Main Street
Uniontown, PA 15401
412-438-8560
Pa. I.D. No. 18621

DATED: August 6, 1991

APPENDIX "A"

A-1

The Supreme Court of Pennsylvania
Western District

Charles W. Johns, Esq.	
Prothonotary	801 City-County Bldg.
Irma T. Gardner	Pittsburgh, PA 15219
Deputy Prothonotary	(412) 565-2816

May 9, 1991

Simon B. John, Esquire
96 East Main Street
Uniontown, PA 15401

In Re: Condemnation by the Commonwealth of
Pennsylvania, etc. v. Commonwealth of
of Pennsylvania, Department of
Transportation
No. 4 W. D. Appeal Docket 1990

Dear Mr. John:

The Court has entered the following order
on your Application for Re-Argument in the
above-captioned matter:

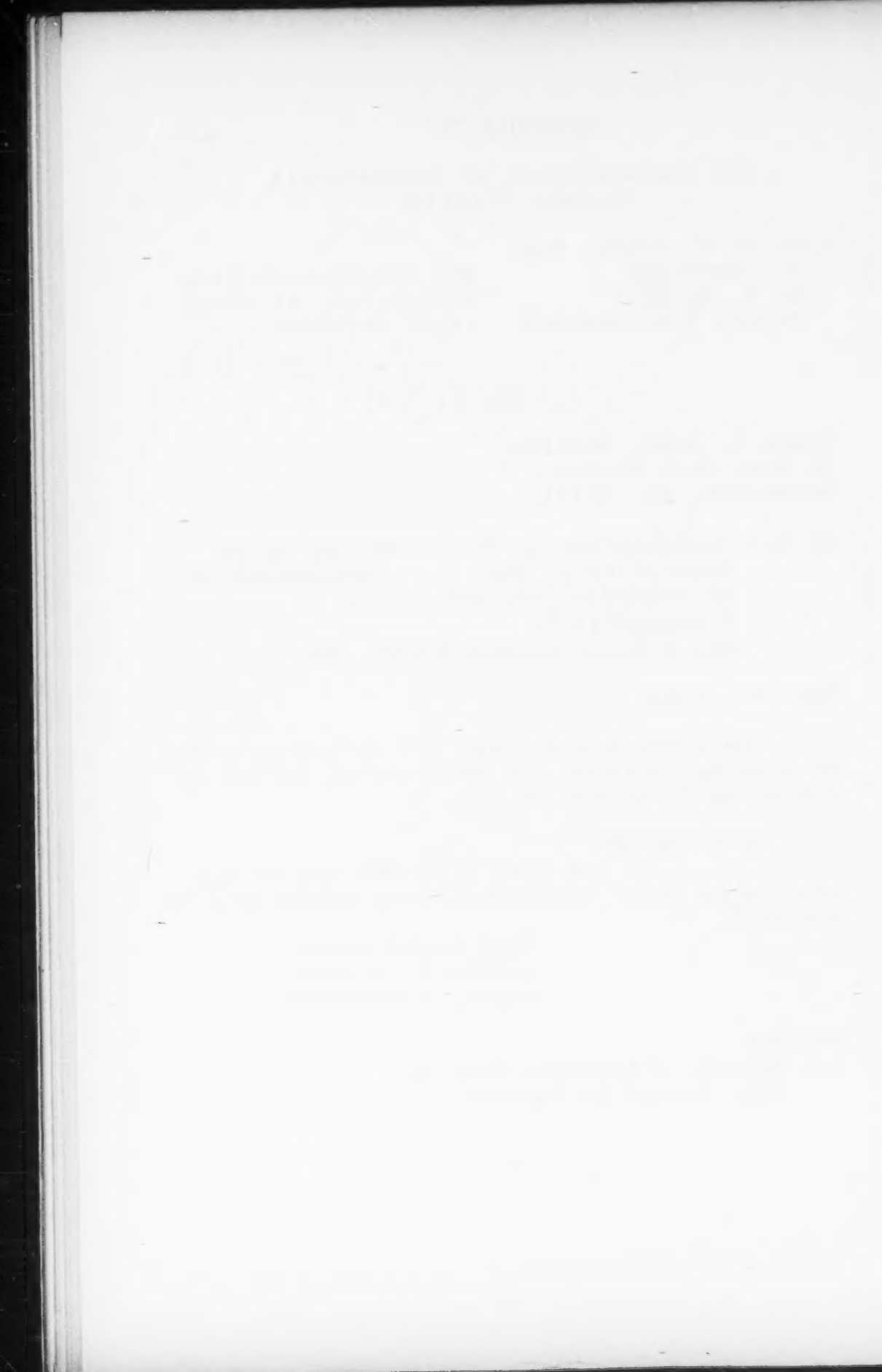
"PER CURIAM:

AND NOW, this 9th day of May,
1991, appellees' Application for Reargument is
denied."

Very truly yours,
s/Irma T. Gardner
Deputy Prothonotary

ITG:abg

cc: Gina M. D'Alfonso, Esquire
Hon. Conrad B. Capuzzi



APPENDIX "B"

B-1

[J-54 of 1991]
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

IN RE: CONDEMNATION : NO. 4 W.D. APPEAL Dkt. 1990
BY THE COMMONWEALTH :
OF PENNSYLVANIA, : Appeal from Order of
PUBLIC UTILITY : Commonwealth Court
COMMISSION OF RIGHT- : entered March 27, 1989,
OF-WAY FOR LEGISLA- : at No. 810 C.D. 1987,
TIVE ROUTE 1058, : Reversing Order of
SECTION A04, A : Court of Common Pleas
LIMITED ACCESS : of Fayette County,
HIGHWAY IN SOUTH : Civil Division, entered
UNION TOWNSHIP, : March 23, 1987, at Nos.
: 977 and 978 of 1979,
ANDREW BARRON and : G.D.
HELEN BARRON and :
FRANK HORVATH and :
ANNA HORVATH : ____ Pa.Comm. ____, ____
: A.2d ____ (1989)
:
v. :
:
COMMONWEALTH OF :
PENNSYLVANIA, :
DEPARTMENT OF :
TRANSPORTATION, :
Appellant. : Argued: March 7, 1991

O R D E R

PER CURIAM: FILED: MARCH 21, 1991

Order of Commonwealth Court reversed.
See Huss v. Commonwealth of Pennsylvania,
Department of Transportation, 99 Pa. Commw.
386, 512 A.2d 1356 (1986).

JUDGMENT ENTERED THIS 21ST DAY OF MARCH, 1991.
/s/ Irma T. Gardner, Deputy Prothonotary

APPENDIX "C"

C-1

IN RE: CONDEMNATION : IN THE COMMONWEALTH COURT
BY THE COMMONWEALTH : OF PENNSYLVANIA
OF PENNSYLVANIA :
PUBLIC UTILITY :
COMMISSION OF RIGHT- :
OF-WAY FOR LEGISLA- :
TIVE ROUTE 1058, :
SECTION A04, A :
LIMITED ACCESS :
HIGHWAY IN SOUTH :
UNION TOWNSHIP :
:
ANDREW BARRON, et al.:
:
v. :
:
COMMONWEALTH OF :
PENNSYLVANIA, :
DEPARTMENT OF :
TRANSPORTATION :
:
ANDREW BARRON et al. :
Appellants. : NO. 810 C.D. 1987

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE JACOB KALISH, Senior Judge

ARGUED: May 26, 1988

OPINION
BY SENIOR JUDGE KALISH

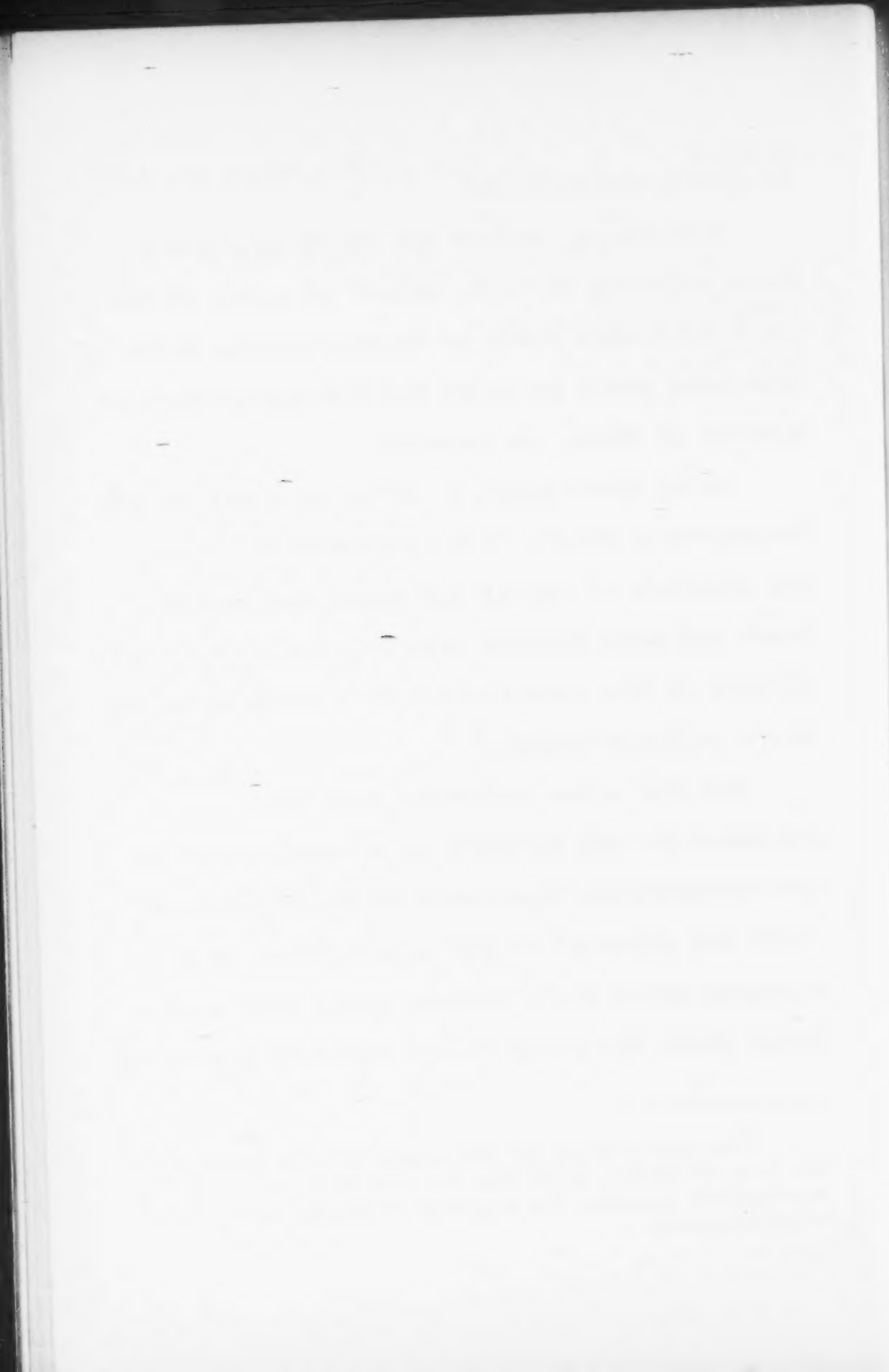
FILED: March 27, 1989

Appellants, Andrew and Helen Barron and Frank and Anna Horvath, appeal an order of the Court of Common Pleas of Fayette County which dismissed their petition for the appointment of a Board of View. We reverse.

On or about April 2, 1974, by order of the Pennsylvania Public Utility Commission (PUC), the premises of Andrew and Helen Barron and Frank and Anna Horvath were appropriated for the purpose of the construction of a grade crossing above railroad tracks.¹

The PUC order indicated that the condemnation was pursuant to an application of the Pennsylvania Department of Transportation (DOT) for approval of the construction of a crossing where state highway route 1058 will cross above the grade of the railroad tracks of

¹Section 2702(b) of the Public Utility Code, 66 Pa. C.S. §2702(b), gives the PUC exclusive power to appropriate property for railroad crossings and to allocate costs.



Penn Central Transportation Company and The Baltimore and Ohio Railroad Company. The PUC ordered that the allocation of the costs and expenses incident to the appropriation for the improvement shall be at the sole cost and expense of DOT.

On July 4, 1974, DOT paid to appellants estimated just compensation. The appellants filed, with the Common Pleas Court of Fayette County, a petition for the appointment of a Board of Viewers to ascertain just compensation due from DOT. A Board of View was appointed in 1979, but never took any action.

On July 8, 1986, appellants filed a petition to transfer jurisdiction nunc pro tunc to the common pleas court for the purpose of determining damages.² The PUC granted

²A condemnation proceeding encompasses two distinct proceedings. The first goes to the propriety and validity of the taking. The second goes to damages.
continued to next page



appellants' petition and referred the matter to the Common Pleas Court of Fayette County, for a determination of the amount of damages. The appellants then filed an amended petition for the appointment of viewers, and DOT filed a motion to dismiss the petition. The court granted DOT's motion, holding that the appellants' petition was not filed within the applicable six-year statute of limitations.³

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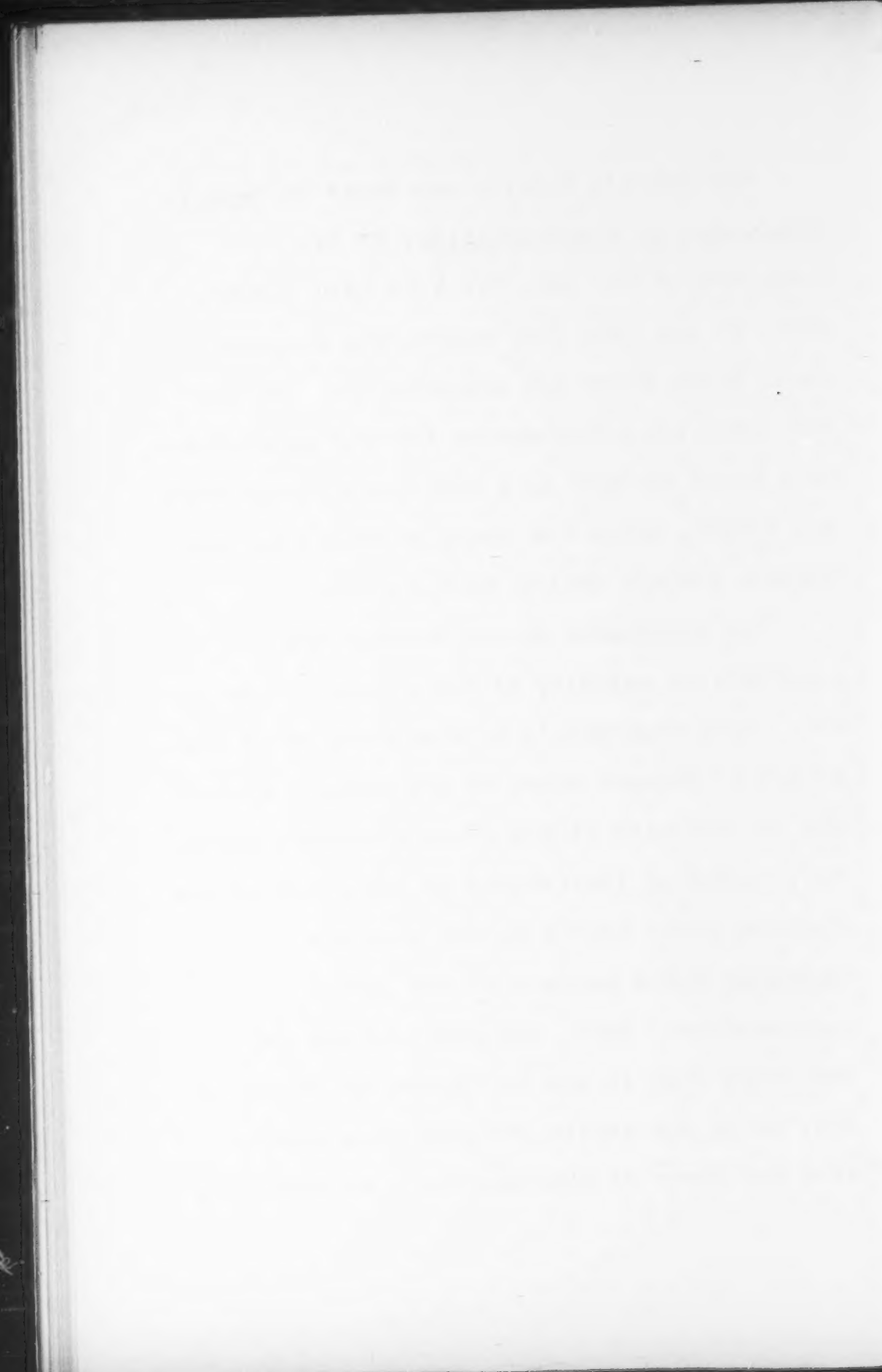
While section 303 of the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. §1-303, gives the common pleas court exclusive jurisdiction in eminent domain matters, it specifically exempts the power and procedure of the PUC in accomplishing a taking. The determination of damages remains in the common pleas court.

³Section 5527(4) of the Judicial Code, 42 Pa. C.S. §5527(4), the statute of limitations in effect at the time the instant action commenced, provided that a petition for the appointment of viewers for the assessment of damages could not be filed after the expiration of six years from the date on which the condemnor made payment. This provision was subsequently amended and now appears as section 5526(4) of the Judicial Code, 42 Pa. C.S. §5526(4).



The court's holding was based on Huss v. Department of Transportation, 99 Pa. Commonwealth Ct. 386, 512 A.2d 1356 (1986), where it was held that unless the property owner first files for compensation with the PUC, then any prior action for the appointment of a Board of View is a nullity, without force and effect, since the court at that time was without subject matter jurisdiction.

The appellants do not contest the propriety or validity of the taking by the PUC. They seek merely a determination of the extent of damages which is exclusively within the jurisdiction of the court of common pleas. The statute of limitations on the claim of the property owner begins to run when the condemnor makes payment of the just condemnation. Here, the order of the PUC indicates that it was condemning on behalf of DOT, which was really the acquiring agency with the power of condemnation. An acquiring



agency, with the power of condemnation, is a condemnor.⁴ It was DOT that paid the estimated just compensation, a duty reserved to the condemnor. When the property owner refused to settle for the estimated just compensation, the matter had to be referred to the common pleas court which had exclusive jurisdiction to determine damages.

The purpose of any statute of limitations is to discourage stale claims which may greatly prejudice the defense of such claims. Ulakovic v. Metropolitan Life Insurance Co., 339 Pa. 571, 16 A.2d 41 (1940). However, this was not a stale claim. Unlike Huss, where the property owner sat on his right until about the time when the statute would bar his right to proceed, from the very beginning DOT was aware of the claim when appellants filed the original petition for the appointment of a Board of View.

⁴Section 201(5) of the Eminent Domain Code, 26 P.S. §1-201(5).



Furthermore, where the statute of limitations is pleaded as a defense, the plaintiff may show circumstances occurring within the statutory period which make it unappealable. Where the facts are clear, it is a question of law. Smith v. Bell Telephone Company of Pennsylvania, 397 Pa. 134, 153 A.2d 477 (1959).

Here, it is clear that the circumstances justified the appellants' brief that they were justified in filing originally for the appointment of a Board of View to determine just compensation.

Accordingly, we reverse.

/s/Jacob Kalish, Senior
Judge

Judge MacPhail did not participate in the decision in this case.

APPENDIX "D"

IN RE: CONDEMNATION : IN THE COMMONWEALTH COURT
 BY THE COMMONWEALTH : OF PENNSYLVANIA
 OF PENNSYLVANIA :
 PUBLIC UTILITY :
 COMMISSION OF RIGHT- :
 OF-WAY FOR LEGISLA- :
 TIVE ROUTE 1058, :
 SECTION A04, A :
 LIMITED ACCESS :
 HIGHWAY IN SOUTH :
 UNION TOWNSHIP :
 :
 ANDREW BARRON, et al.:
 :
 v. :
 :
 COMMONWEALTH OF :
 PENNSYLVANIA, :
 DEPARTMENT OF :
 TRANSPORTATION :
 :
 ANDREW BARRON et al. :
 Appellants. : NO. 810 C.D. 1987

O R D E R

NOW, March 27, 1989, the order of the Court
 of Common Pleas of Fayette County, dated March
 23, 1987, is reversed.

/s/Jacob Kalish, Senior
 Judge

CERTIFIED FROM THE RECORD
 AND ORDER EXIT
 June 2, 1989

/s/C.R. Hostutler
 Deputy Prothonotary-Chief
 Clerk

APPENDIX "E"

IN RE: CONDEMNATION : IN THE COMMONWEALTH COURT
 BY THE COMMONWEALTH : OF PENNSYLVANIA
 OF PENNSYLVANIA :
 PUBLIC UTILITY :
 COMMISSION OF RIGHT- :
 OF-WAY FOR LEGISLA- :
 TIVE ROUTE 1058, :
 SECTION A04, A :
 LIMITED ACCESS :
 HIGHWAY IN SOUTH :
 UNION TOWNSHIP :

ANDREW BARRON, et al.:

v.

COMMONWEALTH OF
 PENNSYLVANIA,
 DEPARTMENT OF
 TRANSPORTATION

ANDREW BARRON et al. :

Appellants. : NO. 810 C.D. 1987

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
 HONORABLE DORIS A. SMITH, Judge
 HONORABLE JACOB KALISH, Senior Judge

ARGUED: May 26, 1988

DISSENTING OPINION
BY JUDGE SMITH

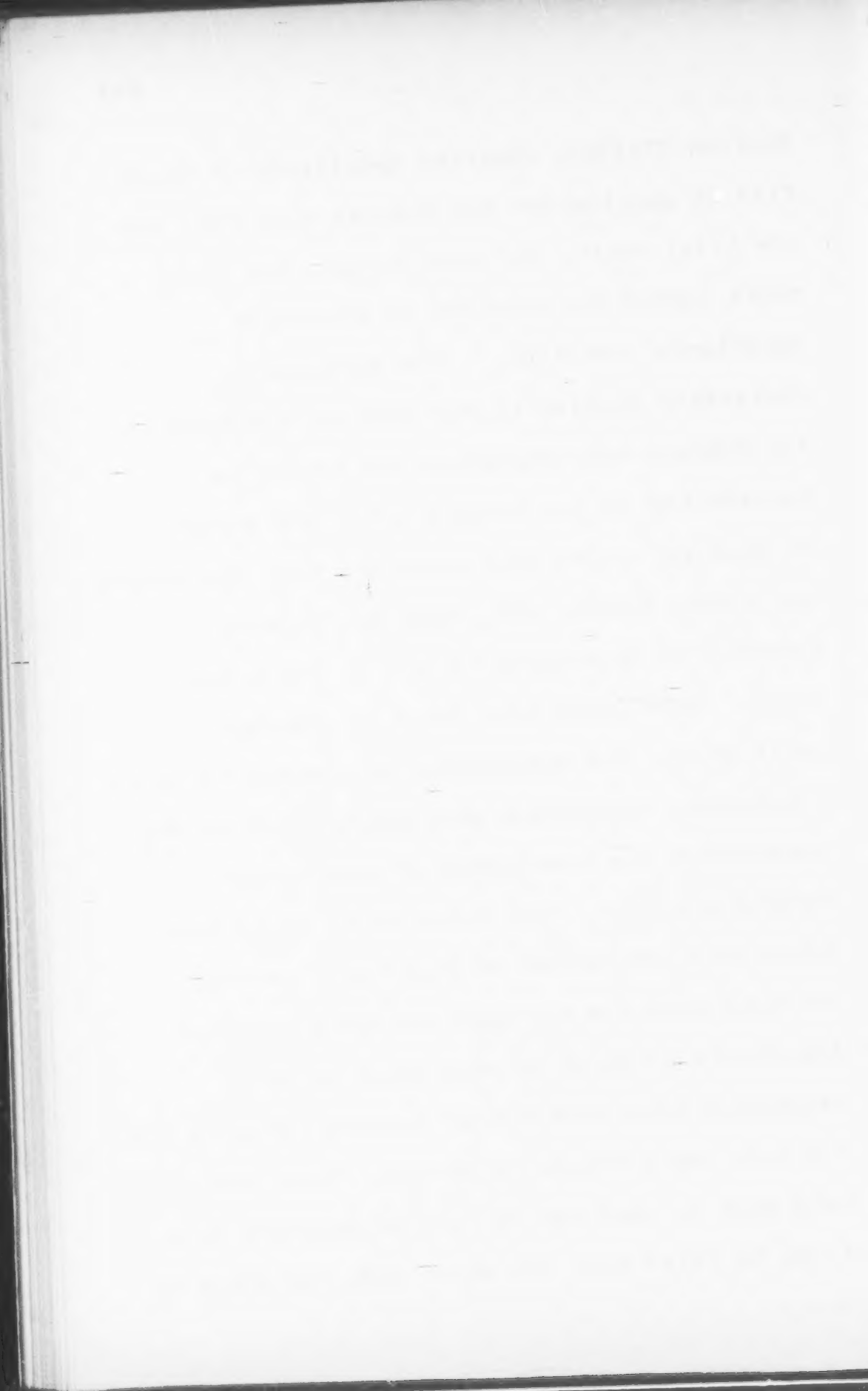
FILED: March 27, 1989

This Court's decision in Huss v. Department of Transportation¹ clearly controls the matter sub judice. Exceptions should not be carved into precedent absent sufficiently substantial factual dissimilarities warranting a different outcome.

In Huss, as here, appellants received estimated just compensation from the Department of Transportation (DOT) for property condemned by order of the Public Utility Commission (PUC). Eight days prior to the expiration of the six-year limitations period, appellants petitioned the common pleas court seeking the appointment of viewers. DOT filed preliminary objections which were sustained by the trial court on the basis that Section 2704(b) of the Public Utility Code (PUC Code), 66 Pa. C.S.

¹ 99 Pa. Commonwealth Ct. 386, 512 A.2d 1356 (1986), appeal granted, 515 Pa. 588, 527 A.2d 547 (1987), appeal dismissed as having been improvidently granted, 518 Pa. 466, 544 A.2d 446 (1988).

Section 2704(b), required appellants to first file an application for damages with PUC, not the trial court, and accordingly, the trial court lacked jurisdiction to entertain appellants' petition. The appellants thereafter applied to PUC seeking compensation for damages and requesting the matter be transferred to the trial court. DOT filed preliminary objections asserting that the matter was timely filed. PUC, however, ordered transfer of appellants' claim to the trial court. Appellants then filed an amended petition for the appointment of viewers to which preliminary objections were again filed by DOT, questioning the timeliness of appellants' amended petition. The trial court found that appellants had failed to file their amended petition with the six-year limitation period. Appellants appealed to this Court which determined that appellants' initial petition did not toll the limitations period. This Court held that an application for compensation must first be filed with PUC which then can elect to



ascertain the amount of damages or refer the matter to the common pleas court in the county where the appropriated property is situated for the appointment of viewers.

It is erroneous to conclude, as the majority, that the trial court enjoyed exclusive jurisdiction to determine the extent of damages pursuant to Section 303 of the Eminent Domain Code, 26 P.S. Section 1-103, since only the power and procedure of PUC in accomplishing a taking is specifically exempted therefrom. To the contrary, Section 303 states in relevant part that the intent of the Eminent Domain Code is "to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages," but is not to be construed "to effect, vary, alter or modify the jurisdiction of power of [PUC]." Section 2704(b) of the PUC Code,² vests PUC with exclusive jurisdiction to

² Section 2704 of the PUC Code governs compensation for damages occasioned by construction, relocation or
continued to next page



ascertain the amount of damages here with the trial court's jurisdiction being derivative, i.e., dependent solely upon whether PUC elects to refer the issue of damages to the trial court. See Huss.

Apparently as an alternative basis upon which to support its reversal of the trial court, the majority stated that the purpose of any limitations period is to discourage stale claims which may greatly prejudice the defending party.³ The majority then concludes that the instant claim is not stale and that, unlike Huss, Appellants here did not sit on their

continued from previous page
abolition of crossings and provides in pertinent part under subsection (a) that the PUC shall, after due notice and hearing, ascertain and determine the compensation for damages due owners whose property is taken, injured or destroyed. Moreover, pursuant to subsection (b), "(t)he commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation, for which purpose such court shall appoint viewers. . ."

³Section 5527(4) of the Judicial Code, 42 Pa. C.S. §5527(4) the statute of limitations in effect at the time the instant action commenced, required actions
continued to next page

rights since DOT, from the inception, was cognizant of the claim. DOT's awareness of Appellants' claim simply bears no relevance to whether the claim is stale since DOT neither has the duty nor authority to ensure that Appellants comply with proper procedure prior to expiration of the limitations period to preserve their rights or to force Appellants to act expeditiously. To premise staleness of a claim, as does the majority, upon the defending party's cognizance thereof is to emasculate the purpose of the limitations period here and to circumvent the expeditious conclusion of legal actions. It also ignores the twelve-year lapse which occurred here between DOT's payment of estimated just compensation and Appellants' 1986 petition for the appointment of viewers.

continued from previous page
and proceedings such as that here to be commenced within six years of the condemnor's payment of estimated just compensation. This provision was subsequently amended and now appears as Section 5525(4) of the Judicial Code, 42 Pa. C.S. § 5526(4).

Nor do the instant circumstances support any belief entertained by Appellants that they were justified in filing their initial request with the trial court for the appointment of viewers as the majority also concludes. Nothing in the record suggests that DOT intentionally acted to mislead Appellants. Moreover, it appears that Appellants were made aware in 1979 of the necessity to first file with PUC prior to petitioning the trial court for the appointment of viewers. See Commonwealth Exhibit A.

Thus, where, as here, PUC has condemned property, the commencement of a proceeding in a common pleas court for the appointment of viewers should be treated as an action without force or effect under Huss as the common pleas court lacks the requisite subject matter jurisdiction to entertain the claim for damages absent PUC's transfer of the matter. Accordingly, Appellants' initial petition in the matter sub judice should have been found to be void ab initio and their subsequent petition, filed twelve years after DOT paid Appellants'

estimated just compensation, barred by the six-year limitations period established in Section 5527(4) the Judicial Code.

/s/Doris A. Smith, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
June 2, 1989

/s/C.R. Hostutler, Deputy
Prothonotary-Chief Clerk

APPENDIX "F"

IN RE: CONDEMNATION	:	IN THE COMMONWEALTH COURT
BY THE COMMONWEALTH	:	OF PENNSYLVANIA
OF PENNSYLVANIA	:	
PUBLIC UTILITY	:	
COMMISSION OF RIGHT-	:	
OF-WAY FOR LEGISLA-	:	
TIVE ROUTE 1058,	:	
SECTION A04, A	:	
LIMITED ACCESS	:	
HIGHWAY IN SOUTH	:	
UNION TOWNSHIP	:	
	:	
ANDREW BARRON, et al.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
ANDREW BARRON et al.	:	
Appellants.	:	NO. 810 C.D. 1987

O R D E R

NOW, June 2, 1989, having considered appellee Department of Transportation's application for reargument and appellant's answer in opposition thereto, said application is hereby denied.

/s/James Crumlish, Jr., P.J.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

June 2, 1989

/s/C.R. Hostutler, Deputy
Prothonotary-Chief Clerk

APPENDIX "G"United States Constitution:ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use without just compensation.

ARTICLE [XIV]Section 1

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

Pennsylvania Constitution:

ARTICLE I

Section 1

Section 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. . .

ARTICLE I

Section 10

Section 10. Initiation of criminal proceedings; twice in jeopardy; eminent domain

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured. . .

Adopted Nov. 6, 1973.

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- ARTICLE I
Section 11

**Section 11. Courts to be open; suits
against the Commonwealth**

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct. . .

26 P.S. Section 1-502(a): (Eminent Domain)

Section 1-502. Petition for the
appointment of viewers

(a) The condemnee may file a petition requesting the appointment of viewers setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of taking, with an identification of the petitioner and his property. The petitioner shall be designated as the plaintiff. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same court term and number as the declaration of taking.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed and remain undisposed of.

REPORT

ON THE PROGRESS OF THE WORK DURING THE YEAR 1900

The year 1900 has been a year of great activity and progress in the work of the Department. The following is a summary of the work done during the year.

The first part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

The second part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

The third part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

Summary of the work done during the year 1900

The work done during the year 1900 can be divided into three main parts: the completion of the work on the "History of the Department", the completion of the work on the "History of the Department", and the completion of the work on the "History of the Department".

The first part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

The second part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

The third part of the year was devoted to the completion of the work on the "History of the Department" which was published in the "Transactions of the Department" for the year 1900.

(3) The name of the condemnor.

(4) The names and addresses of all condemnees and mortgagees known to the petitioner to have an interest in his property and the nature of their interests.

(5) A brief description of his property which may include any or all of his properties in the same county taken, injured or destroyed for the same purpose by the condemnor, whether by the same or separate declarations or without a declaration of taking.

(6) A request for the appointment of viewers to ascertain just compensation. . .

42 Pa. C.S.A. Section 931(a): (Judiciary and Judicial Procedure)

Section 931. Original jurisdiction and venue

(a) General Rule.--Except where exclusive original jurisdiction of an action proceeding is by statute or by general rule adopted pursuant to section 503 (relating to reassignment of matters) vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas. . .

66 Pa. C.S.A Section 2704(b): (Public Utilities)

Section 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings

(b) Judicial Review.--Any party to the proceeding dissatisfied with the determination of the commission may appeal therefrom, as provided by law, and for this purpose is hereby authorized to sue the Commonwealth. The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation, for which purpose such court shall appoint viewers, from whose award of damages an appeal to said court shall lie on the part of any person or party aggrieved thereby, under the general law applicable to the appointment of viewers, for the ascertainment of damages due to the condemnation of private property for public use.

. . .